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Panaji, 29th March, 2012 (Chaitra 9, 1934)

SERIES II No. 52

OFFICIAL GAZETTE

GOVERNMENT OF GOA

PUBLISHED BY AUTHORITY

Note:- There are five Extraordinary issues to the Official Gazette, Series II No. 51 dated 22-3-2012 as follows:-

1) Extraordinary dated 22-3-2012 from pages 1375 to 1376 regarding Notification from Goa Legislature Secretariat.

2) Extraordinary (No. 2) dated 22-3-2012 from pages 1377 to 1378 regarding Notification from Department of Finance (Office of the Commissioner of Commercial Taxes).

3) Extraordinary (No. 3) dated 26-3-2012 from pages 1379 to 1380 regarding Notification from Department of Finance (Budget Division).

4) Extraordinary dated 26-3-2012 from pages 1381 to 1382 regarding Notification from Goa Legislature Secretariat and Order from Department of Law & Judiciary (Establishment Division).

5) Extraordinary dated 27-3-2012 from pages 1383 to 1384 regarding Notification from Department of Elections (Goa State Election Commission).

GOVERNMENT OF GOA

Department of Education, Art & Culture

Directorate of Education

School Education

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Order

No. 14/13/98-EDN/Part-I/45

On the recommendation of the Goa Public Service Commission conveyed vide their letter No. COM/II/ /11/15(3)/2011/333 dated 05-01-2012, Government of Goa is pleased to promote Shri Dilip R. Bhagat, Assistant Director of Education to the post of Deputy Director of Education in the Directorate of Education, Porvorim on regular basis in the pay scale of ₹ 15,600-39,100 with Grade Pay of ₹ 6,600/- with immediate effect.

Shri Dilip R. Bhagat shall be on probation for a period of two years. His pay shall be fixed as per the Rules.

The above officer shall exercise his option for fixation of his pay in the promotional grade in terms of provision of F.R. 22(I)(a)(i) within a period of one month from the date of his appointment as Deputy Director of Education.

Shri Dilip R. Bhagat will continue to work in the Goa Sarva Shiksha Abhiyan until further orders on working arrangement.

The option once exercised shall be final.

By order and in the name of the Governor of Goa.

Anil V. Powar, Ex officio Joint Secretary (School Education).

Porvorim, 19th March, 2012.

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Department of Labour

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Notification

No. 28/1/2012-LAB/120

The following award passed by the Labour Court-II, at Panaji-Goa on 13-01-2012 in reference No. IT/32/04 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 14th March, 2012.

THE LABOUR COURT-II
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Suresh N. Narulkar, Hon'ble Presiding Officer)

Case No. Ref. IT/32/04

Shri Kedar Gaonkar,
Rep. by the General Secretary,
Goa Trade & Commercial Workers Union,
Velho's Bldg., 2nd Floor,
Panaji-Goa. … Workman/Party I

V/s

M/s. Mangesh Plastics Pvt. Ltd.,
56, Bethora Industrial Estate,
Ponda-Goa. … Employer/Party II

Workman/Party I represented by Adv. Shri Suhas Naik.

Employer/Party II represented by Adv. Shri G. B. Kamat.

Panaji, dated: 13-01-2012

AWARD

1. In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947), the Government of Goa, by Order dated 24-08-2004, bearing No. 28/09/2004-LAB/625, referred the following dispute for adjudication by Industrial Tribunal of Goa.

"(1) Whether the action of the Management of M/s. Mangesh Plastics Private Ltd., Bethora Industrial Estate, Ponda-Goa in refusing the employment to Shri Kedar T. Gaonkar, (Worker Grade) with effect from 17-12-2003, is legal and justified?

(2) If not, to what relief the Workman is entitled?"

2. On receipt of the reference, a case was registered under No. IT/32/2004 and registered A/D notice was issued to the parties. In pursuance to the said notice, the parties put in their appearance. The Workman/Party I (for short "Union"), filed its Statement of Claim on 09-11-2004 at Exb. 4 in support of the contention that the action of the Employer/Party II, (for short "Employer") in refusing employment to the Workman named in the Order of Reference is illegal & unjustified. The facts of the case in brief as pleaded by the Union are that the Employer is a factory situated at Bethora Industrial Estate, Ponda-Goa. That the Workman, Shri Kedar T. Gaonkar was employed by the Employer w.e.f. 01-08-2002 alongwith ten other Workmen at its Factory on permanent basis. That the wages and the salary paid to these Workmen were very low and pathetic and the Workmen were denied the benefits of all Welfare Labour Legislations. That the Workmen working in the factory of the Employer unionized themselves under the banner of the Union, by resolution dated 21-05-2003 and a copy of the intimation was sent to the Employer as well as Registrar of Trade Union by registered A/D notice dated 10-06-2003. That after the unionization, the Employer started resorting to various unfair labour practices and forced the Union Members to forsake their membership and their allegiance with the Union. That since the Workmen failed to forsake the Union Membership; they were selectively harassed and victimized and were threatened that their services would be terminated, if they do not forsake the Union Membership. That the Workman, Shri Kedar T. Gaonkar was also refused employment for the above reason, is an example of harassment and victimization for not forsaking membership of the Union. That the Employer suddenly on 17-12-2003 refused the employment to Shri Kedar T. Gaonkar without assigning any justified reasons. That in fact the Workman worked on 17-12-2003 in the morning shift till 12.00 hrs. and at around 12.00 hrs. the Manager of the Employer informed the Workman not to report for work any further and that his services stands terminated with immediate effect. The Union submits that the action of the Employer in orally refusing employment to the Workman amounts to illegal termination of his services. The Union submits that before refusal of employment to the Workman, the Employer failed to give any opportunity to defend his case. The Union submits that no prior notice, notice pay, compensation was paid to the Workman before illegal refusal of his employment. The Union contended that the refusal of employment to the Workman is in violation of Sec. 25-F of the I. D. Act, 1947 and the rules made thereunder. The Union submits that after refusal of the employment, the Workman approached the Employer on many occasions with a request to reinstate him in service, however, the Employer refused to reinstate him in its service. Being aggrieved by the attitude of the Employer, the Workman raised an Industrial dispute dated 31-12-2003 through his representative Union before the Assistant Labour Commissioner, Ponda-Goa which ended in failure. The Union submits that the refusal of employment/oral termination of service of the Workman is illegal and bad-in-law and is an act of unfair labour practice resorted to harass and

victimize the Workman in order to undermine his legitimate trade union activities. The Union stated that the Workman is presently unemployed and does not have any source of income. The Union therefore prayed that the action of the Employer in refusing the employment to the Workman w.e.f. 17-12-2003 from 12.00 hrs. be held as illegal, unjustified and bad-in-law and the Workman be reinstated back in services with full back wages and continuity in service.

3. The Employer filed it is written statement on 01-01-2005 at Exb.-5. The Employer Company controverted the claim of the Union, preliminarily on the ground that the statement of claim filed in the present case by Shri R. D. Mangueshkar purporting to be the General Secretary of the Union Goa Trade and Commercial Workers Union has no locus standi to espouse the dispute so as to invest it with the status of an Industrial Dispute or that the said Union can claim a representative character in such a way that its support to the cause would make the dispute an industrial dispute. The Employer without prejudice to its aforesaid submission, denied that the Workman has authorized the Union at the time or before the reference, to represent or espouse his cause with it by raising an Industrial dispute or that the General Secretary of the Union has authority to sign Claim Statement on behalf the Workman and as such the very Order of Reference made by the Govt. of Goa to this Hon'ble Tribunal for adjudication of the alleged dispute between the parties is illegal, invalid and not maintainable and is liable to be rejected.

4. The Employer stated that it is a Private Limited Company incorporated under the Companies Act, 1956 and is presently engaged in the business of manufacture of multi-layer plastic films and printing thereon, since about March, 1998 at its factory establishment situated at 56, Bethora Industrial Estate, Ponda-Goa with the employment of 13 Workmen. The Employer however admitted that it has orally employed the Workman under reference since 01-08-2002 as a "Helper" on temporary basis and was working as such till the date of termination of his service w.e.f. 17-12-2003. The Employer stated that Shri Sanjay Naik who is working in the capacity of the Manager of the said factory establishment since March, 1998, is looking after day-to-day affairs and is incharge of its Management. The Employer stated that its employee, Shri Dnyaneshwar Dangle is working as a "Supervisor-cum-Operator" since the year 2000. The Employer stated that on 04-12-2003 the said Manager after taking monthly stock of the filled/ /empty drums containing solvent used in connection with the printing and lying in its godown, found one empty drum less. The Employer stated that it has made an enquiry with the Workmen including the Workman under reference about the same and during the course of its preliminary enquiry, it was revealed the Workman has taken away one empty drum after completion of third shift on 02-12-2003 i.e. on 03-12-2003 at about 8.30 a.m. on which said date, the establishment was closed on account of holiday, by bringing a hired vehicle from outside to its factory. The Employer stated that the Workman having admitted the fact that he had himself taken the drum also admitted the guilt on his part in the presence of Shri Dnyaneshwar Dangle. The Employer stated that the said Manager issued a letter dated 13-12-2003 to the Workman requiring him to offer his explanation on or before 15-12-2003 before joining his duty. The Employer stated that the Workman submitted his reply dated 15-12-2003 wherein he categorically stated that he had taken a drum without informing the Manager and admitted the guilt on his part. The Employer stated that after taking view of the entire matter and taking into account, the admission of the guilt by the Workman on his part, came to a bonafide conclusion that the Workman's further retention in the employment would not be conducive in its employment and as such decided to terminate the service of the Workman by way of discharge simplicitor. The Employer stated that accordingly it has terminated the services of the Workman w.e.f. 17-12-2003 under its letter of termination dated 16-12-2003. The Employer stated that the Workman was served with the said letter of termination by its Manager on 16-12-2003 in the forenoon alongwith notice pay, retrenchment compensation, salary till 16-12-2003 in cash in the presence of Shi Dnyaneshwar Dangle. The Employer stated that upon serving the said letter of termination and tendering the final settlement dues in cash as aforesaid, the Workman refused to accept the same and left the factory premises with a threat that he would teach a lesson to the said Manager. The Employer submitted that since the action of the Workman was not the moving factor or foundation for issuing the said Order of Termination, the said termination of services of the Workman by it is perfectly legal and justified and it does not cast any stigma on the Workman. The Employer denied the overall case as pleaded by the Union in its Claim Statement filed in the present proceedings and prayed that the Hon'ble Tribunal be held that the termination of service of the Workman is perfectly legal and justified.

5. Thereafter, the Union filed its rejoinder on 22-03-2005 at Exb. 6. The Union, by way of its rejoinder reiterates and confirms all the submissions and averments made by it in its claim statement to be true and correct and denies all the statements and averments made by the Employer in its Written Statement which are contrary and inconsistent with the statements and averments made by them.

6. Based on the pleadings of the respective parties filed in the present proceedings, the Hon'ble Industrial Tribunal framed the following issues at Exb. 07 on 15-04-2005.

1. *Whether the Party I Union proves that it has the locus standi to espouse the dispute on behalf of the Workman, Shri Kedar T. Gaonkar and represent him in the present reference?*
2. *Whether the Party I Union proves that the Workman, Shri Kedar T. Gaonkar was refused the employment by the Party II from 17-12-2003?*
3. *Whether the Party I Union proves that the action of the Party II in refusing employment to the Workman, Shri Kedar T. Gaonkar w.e.f. 17-12-2003 is illegal and unjustified?*
4. *Whether the Party II proves that the services of the Workman, Shri Kedar T. Gaonkar were terminated w.e.f. 17-12-2003 by letter dated 16-12-2003 by way of "discharge simplicitor" because his employment was not found to be conducive for the working of the Party II?*
5. *Whether the Workman, Shri Kedar T. Gaonkar is entitled to any relief?*
6. *What Award?*

7. My answers to the aforesaid issues are as under:

Issue No. 1	:	In the affirmative.
Issue No. 2	:	In the affirmative.
Issue No. 3	:	in the affirmative.
Issue No. 4	:	In the negative.
Issue No. 5 &. 6	:	As per final order.

Reasons

Issue No. 1:

I have heard the arguments of the Ld. Advocates appearing for the respective Parties.

8. Ld. Adv. Shri Suhas Naik representing the Union during the course of his oral arguments submitted that the Workmen of the Employer Company were the members of Goa Trade and Commercial Workers Union and the said Union vide its letter dated 10-06-2003 supported by a resolution of its Workmen addressed to the Employer at Exb. W/1 informed about the Unionization of the Workmen under its banner and also gave the names of the office bearers of the Manguesh Plastic Workers Committee. He submitted that the Union has also produced on record a Charter of Demand dated 27-04-2004 raised by the said Union (Exb. W/8), letter of the Union dated 21-07-2003 (Exb. W/9) requesting to resolve the grievances of the Workmen, receipts of payments of membership fees (Exb. W/5), letter of the Employer dated 21-11-2005 addressed to the Union (Exb. W/6) showing that the said Union was representing the Workmen of the Employer Company before various authorities, forum and Courts under due authorization. He submitted that the aforesaid documentary evidence on record shows that the Union has every right and locus standi to represent the Workmen of the Employer Company including the Workman under reference before this Court as well as various authorities and forums.

9. On the contrary, Ld. Adv. Shri G. B. Kamat representing the Employer during the course of his oral arguments submitted that the present issue is a jurisdictional issue to be decided by this Labour Court-II before it can assume jurisdiction to adjudicate upon the Industrial Dispute as its very jurisdiction would depend upon a correct finding as to whether the Union has/had the locus standi to espouse the dispute and relied upon a decision of **Hon'ble High Court of Bombay** in the case of **M/s. P. G. Virgincar & Co. v/s S. V. Nevagi & Ors.** reported in **1995 LAB I. C. 1075.** He submitted that the burden to prove the present issue is cast on the Union to prove that it is the representative Union and it has the authority to espouse the dispute on behalf of the Party I. He submitted that it has taken an objection as to the maintainability of the reference at the earliest opportunity in its Written Statement by raising preliminary objection and relied upon a decision of **Hon'ble High Court of Bombay** in the case of **Iqbal Ahmed Kamaruddin v/s P. L. Muzumdar** reported in **1992 (64) FLR 827.** He submitted that the existence of Industrial Dispute is the condition precedent for exercising jurisdiction by the appropriate Government u/s 10 of the I. D. Act, 1947. He submitted that Industrial Disputes envisages a collective dispute however, after the introduction of Sec. 2-A an individual dispute is deemed to be an Industrial Dispute within the meaning of the Act, notwithstanding that no other Workman nor any Union of the Workmen

espouses such a dispute. He submitted that in the case in hand, the dispute is not raised by the Workman himself, but is raised by the Union on behalf of the Workman. However no evidence of whatsoever nature has been produced by the Union in form of a resolution or otherwise to show that the Workman had authorized the Union espouse his cause by raising a dispute to prove that it was duly authorized to espouse the dispute of the Workman nor the Union has examined any of its Office Bearer in support of its contention that it has/had authority to espouse the cause of the Workman. He submitted that there is nothing on record to prove that the Office Bearer was authorized to take up the cause of the Workman. He submitted that the aforesaid evidence was required because the Union is a General Union and not the Union of the establishment of the Employer and relied upon a decision of **Hon'ble High Court of Calcutta** in the case of **Deepak Industries v/s State of West Bengal** reported in **1975 LAB I. C. 1153** and a decision of **Hon'ble High Court of Madras** in the case of **Nellai Cotton Mills v/s Labour Court, Madurai and Anr.** reported in **1965 (I) LLJ 95.** He also relied upon two decisions of Hon'ble Supreme Court of India one **in the case of J. H. Jadhav v/s M/s. Forbes Gokak Ltd.** reported in **2005, (104) FLR 1005** and another **in the case of Bombay Union of Journalist v/s The Hindu** reported in **1961, (1) LLJ 436.**

I Have carefully perused the records of the case. I have also considered the various oral submissions made by the Ld. Advocates for the respective parties.

10. The objection raised by the Employer that the dispute which had been referred is not an Industrial Dispute as the Union which has raised the dispute pertaining to the non-employment of the Workman has no locus standi to do so. The Hon'ble High Court of Bombay in its case of **Iqbal Ahmed Kamaruddin v/s P. L. Muzumdar** reported in **1992 (64) FLR 827,** in para 8 of its Judgment has held as under:

"If what is referred to a Tribunal/Labour Court is not an Industrial Dispute, it is always open to a Party to show to the forum that the dispute referred for adjudication though purported to be an Industrial Dispute, is in reality not an Industrial Dispute at all. This has always been recognized as an exception to the general rule postulated in Section 10 (4). It is therefore always permissible for an Employer to raise an issue as to whether what has been referred is an Industrial Dispute at all and there can be no question of the Tribunal being bound by the order of reference. It is a settled law that the appropriate Government makes a reference upon the prima facie view of the matter as to the existence or apprehension of the Industrial Dispute. It is open to the parties to show that what is referred is not in reality an Industrial Dispute at all".

11. The Hon'ble Calcutta High Court in its case of **Deepak Industries Ltd., and anr. v/s State of West Bengal reported in 1975 Lab. I. C. 1153** has held that *"mere negotiations by some officials of the Union with the Employers for conciliations or executing certain documents on behalf of the Workman prior to reference are not conclusive proof of the authority of the Union, to represent the Workman whose dispute it is espousing before the Tribunal"*. The principal laid down by the Bombay High Court and the Calcutta High Court in the above referred cases therefore makes it clear that the Employer is entitled to raise an objection that the dispute referred is not an Industrial Dispute, even after the reference is made by the Government and the mere fact that the Employer participated in the conciliation proceedings or did not raise any objection during the conciliation proceedings, does not debar the Employer from raising the objection before the Tribunal in a reference that the Union has no locus standi to raise the dispute and hence there is no Industrial Dispute.

12. Now it is to be seen whether the reference is not maintainable because there is no Industrial Dispute as the Union namely the Goa Trade and Commercial Workers Union has no locus standi to raise the dispute on behalf of the Workman as contended by the Employer. Industrial Dispute envisages a collective dispute. Unless there is an Industrial Dispute, the reference made by the Government of Goa is not maintainable. However after the introduction of Section 2-A to the Industrial Dispute Act, 1947, an individual dispute as contemplated under the said section is deemed to be an Industrial dispute within the meaning of the said Act. Section 2-A contemplates individual dispute as an Industrial Dispute when a Workman is discharge, dismissed, retrenched or his services are terminated by the Employer. The Dispute involved in the present case is as regards termination of the service of the Workman. Admittedly the Workman has not raised dispute by himself in his individual capacity, but it is the Goa Trade and Commercial Workers Union which has raised the dispute on his behalf. In other words it is the Union who has espoused the dispute on behalf of the

Workman. If the dispute was raised by the Workman himself, it would have been deemed to be an Industrial Dispute and the reference of the dispute by the Government would be valid. However if the dispute is raised by the Union and the Employer has challenged its authority to raise the dispute, the Union must prove its authority by producing some material evidence before the Labour Court. The aforesaid view taken by me is supported by the decisions of Hon'ble High Court of Calcutta in the case of **Deepak Industries Ltd. (Supra)** which has been relied upon by Adv. G. B. Kamat representing the Employer. In Para 7 of the Judgement, the Calcutta High Court held as follows:

".....The amended Sec. 2A makes it clear that when an individual dispute is not sponsored by other Workman or espoused by the Union of the Workman, even then, it would be deemed to be an industrial dispute within the meaning of the Act. Inspite of the said amendment which brings in individual disputes within the scope of the Act, it has not made any difference on the principles as to what would constitute an industrial dispute within the meaning of the Industrial Disputes Act. If it is an industrial dispute within the meaning of the Industrial Disputes Act. If it is an industrial dispute that is a dispute raised by an individual, it must be raised by him and the reference may be in due course for adjudication under the said Act. On the other hand, if a group of Workmen raise a dispute, that can also constitute a industrial dispute within the meaning of the Act, which may be referred to the Tribunal in due course. But, when the dispute is espoused or sponsored by an Union, it seems to have been uniformly held by the judicial decisions which has been referred to by the parties and mentioned hereinbefore that when the authority of the Union is challenged by the Employer, it must be proved by the production of material evidence before the Tribunal to which such a dispute has been referred the Union has been duly authorized either by a resolution of its member or otherwise that it has the authority to represent the Workman whose cause it is espousing. Mere fact that the said Union is registered under The Indian Trade Union Act is not conclusive proof of its real existence or the authority to represent the Workman in the reference before the Tribunal....."

"..... It is immaterial whether the said Union is a general Union of the Workman of a particular industry or it is a Union of the particular establishment relating to which the dispute has arisen between it and its Workmen. In each case in ascertaining whether an individual dispute has acquired the character of an industrial dispute, the test is whether at the date of the reference, the dispute was taken up or supported by the Union of the Workman of the employer against whom the dispute is raised by an individual Workman or by an appreciable number of Workman".

13. Therefore, after the introduction of Sec. 2-A, the dispute of discharged, dismissed or retrenched Workman can be raised by the Workman himself or it can be raised by the Workman of the establishment or by the Union. But, when such a dispute is raised by the Workman himself, the dispute is between the individual Workman and the Employer and when it is raised by the Workmen or the Union, the dispute is between the Workman of the establishment as a class and the Employer and in such a case, the Workmen collectively are the party to the dispute and not the Workman individually. Further, when the dispute is not raised by the Workman himself, but is raised by the Union, if the authority of the Union is challenged, such authority is to be proved by producing material evidence before the Tribunal. If the dispute is raised by the Union of the Workmen of the establishment itself, the presumption is that the Workman of the establishment has community of interest with the individual employee who is their fellow Workman. But the question is different when the dispute is raised by a Union which is not of the Workman of the establishment, but by a General Union of which the Workman of a particular establishment becomes its members. In such a case, community of interest is to be proved. Such a Union must have a representative character, so as to make a dispute an industrial dispute.

14. In the case in hand, admittedly the dispute is not raised by the Workman himself, but it is espoused by the Union i.e. the Goa Trade and Commercial Workers Union. The statement of claim as well as rejoinder is filed by the General Secretary of the Union. The said Union is not the Union of the workers of the establishment of the Employer, but it is a General Union. The Union has examined the Workman as its sole witness. The said Workman in his oral evidence on record deposed that he alongwith other Workmen of the Employer establishment signed a resolution dated 21-05-2003 and joined the membership of the said Union as the Employer had not issued to them any appointment letters and produced on record a letter of the Union dated 10-06-2003 addressed to the Employer alongwith a copy of the resolution of the Workmen (Exb. W/1-Colly). The said letter of

the Union dated 10-06-2003 which is on record at Exb. W/1-Colly indicates that the Union had informed the Employer about the unionization of its Workman under its banner by taking a resolution on 21-05-2003 resolving that they have authorized the Union to represent them before various Courts and authorities. The said resolution dated 21-05-2003 has been signed by 10 Workmen including the Workman under reference out of 13 Workmen of the Employer Establishment. Thus, the same Union has acquired a representative character and as such the Union is authorized to espouse the cause of the Workman. The Union has also produced on record a receipt of payment of membership fees which is on record at Exb.-W/5. Thus the evidence on record indicates that at the date of the reference the dispute was taken up or supported by the Union of the Workman of the Employer against whom the dispute is raised.

15. The **Hon'ble Supreme Court of India** in the case of **Workmen v/s M/s. Dharam Pal Premchand** reported in **AIR 1966 SC 182** has held that, *"when the Workman of an establishment have no Union of their own, some or all of them may join the Union of another establishment belonging to the same industry and such an Union may take up the cause of a Workman working in the establishment and it would be an Industrial Dispute."* The Supreme Court however further held that, *"this Union should have a representative character vis-a-vis the employees employed in the establishment of the Employer, i.e. an appreciable number of Workmen from the concerned establishment must have joined the said Union".*

16. In the case of **Workmen of Indian Express Newspaper (P) Ltd., v/s the Management of Indian Express Newspaper Pvt. Ltd.,** reported in **AIR 1970 SC 737.** In the said case, *"31 working Journalists out of 131 working with the Indian Express Newspaper Pvt. Ltd., where the members of the Delhi Union of Journalists which was not the union of the working Journalists employed in the said company and the said Union to cub the dispute of the two employees working with the said company."* The Supreme Court held that, *"since about 25% of the Working Journalists working with the company were the members of the said Union, it gave representative character to the said Union".* Therefore, it follows that the Union gets the authority to espouse the dispute of a Workman of an establishment only when it has the representative character.

17. **The Madras High Court** in the case of **Mellai Cotton Mills v/s Labour Court** reported in **1965 I LLJ 95** has held that, *"In the case of espousal of the dispute by a Union, it is not sufficient that the union had its membership a substantial member of Workmen from the establishment in which the concerned Workmen were employed".* The High Court held that *"It must be further shown that a substantial members of such Workmen participated in or acted together and arrived at an understanding by a resolution or by other means and collectively supported the dispute."*

18. In the case of the **Workmen of Indian Express Newspaper Pvt. Ltd.,** also there were two resolutions, one passed in the meeting of the 17 working Journalists of the Company who had become the members of the Delhi Union of Journalists and the another resolution passed by the executive committee of the Delhi Union of Journalists, which stated that after considering the representation made to it by the employees of the Indian Express decided to take up the cause of the two Workmen and authorized the office bearers of the union to initiate the necessary proceedings.

19. In the light of what is discussed above, I am of the view that the Union has proved its authority to espouse the dispute on behalf of the Workmen. The evidence on record indicates that the said Union has made various representations to the employer establishment. The letter of the Union dated 10-06-2003 alongwith the resolution of the Workmen of the Employer Company which is on record at Exb. W/1-Colly clearly proves that the office bearers of the Union were authorized to take up the cause of the Workmen. Therefore, it is held that the Union namely the Goa Trade and Commercial Workers Union could validly represent the Workmen so as to transform the dispute between the Workman and the Employer into an Industrial Dispute. Hence it is held that the Union had the authority or the locus standi to espouse the cause of the Workmen. It therefore follows that the dispute referred by the Government pertains the character of an Industrial Dispute. This being the case, the reference made by the Government is valid. I, therefore hold that the Union has succeeded in proving that the Union, namely, the Goa Trade and Commercial Workers Union has locus standi to raise the dispute on behalf of the Workmen and there is an Industrial Dispute and as such the reference is maintainable. The issue No. 1 is therefore answered in the affirmative.

Issue No. 2:

20. The Employer in its written statement filed in the present proceedings clearly admitted that it has terminated the services of the Workman by passing a simple order of termination. Even otherwise, the Workman in his oral evidence on record clearly deposed that on 17-12-2003 at around 12.00 hrs. when he was on duty the Manager, of the Employer, Shri Sanjay Naik orally told him that his services are not required any further and that his services stands terminated and that he should not report for work henceforth. He also deposed that he was not allowed to resume for his duty. Thus, the evidence on record indicates that the Workman was orally refused employment w.e.f. 17-12-2003 and the said refusal of employment said termination of services of the Workman. The issue No. 2 is therefore answered in the affirmative.

Issue No. 3 & 4:

21. I am deciding issue No. 3 & 4 simultaneously as both the said issues No. 3 & 4 are co-related to each other. The burden to prove the Issue No. 3 is on the Union; however the burden to prove the issue No. 4 is on the Employer.

I have carefully perused the entire records of the case. I have also considered the various oral submissions made by the Ld. Advocates for the respective parties.

22. Ld. Adv. Shri Suhas Naik representing the Workman during the course of his oral arguments submitted that the Workman was refused employment w.e.f. 17-12-2003 and that the said refusal of employment amounts to the termination of services of the Workman. He submitted that the services of the Workman were terminated by alleging certain acts of misconduct on the part of the Workman. He submitted that the Employer has however failed to investigate the said alleged acts of misconduct on the part of the Workman by holding an enquiry. He therefore submitted that thus the action of the Employer in suddenly terminating the services of the Workman is in violation of the principles of natural justice. He submitted that the Workman has not been paid one month wages in lieu of notice, retrenchment compensation etc. so as to comply the mandatory pre-conditions of provisions of Sec. 25-F of the I. D. Act, 1947. He therefore, submitted that the action of the Employer in terminating the services of the Workman is therefore illegal, unjustified and bad-in-Law.

23. On the contrary, Ld. Adv. G. B.. Kamat, representing the Employer, during the course of his oral arguments, submitted that it has terminated the services of the Workman w.e.f. 17-12-2003 as the Workman had taken away an empty drum from its factory premises without its knowledge and consent. He submitted that the aforesaid fact has been admitted by the Workman in the presence of Shri Dnyaneshwar Dangle, the Supervisor-cum--Operator. He submitted that the Workman vide his reply dated 15-12-2003 also categorically admitted that he had taken the drum without informing the Manager of the Employer. He submitted that the Employer after taking view of the entire matter and taking into account the admission of the guilt by the Workman as aforesaid it has terminated the services of the Workman by way of discharge simplicitor as the Workman's further retention in the employment would not be conducive to its working. He submitted that the said termination of service of the Workman does not cast any stigma on the Workman. He submitted that the services of the Workman were terminated by serving him with the said letter of termination on 16-12-2003 in the forenoon alongwith the notice pay, retrenchment compensation and his salary till 16-12-2003 in cash which he refused to accept the same. He therefore submitted that the termination of the service of the Workman is therefore perfectly legal and justified.

I have carefully perused the records of the case. I have also considered the various oral submissions made by the Ld. Advocates for the respective parties.

24. Admittedly, the Workman was orally employed by the Employer w.e.f. 17-12-2003. The Workman was in the employment of the Employer since the date of his appointment w.e.f. 01-08-2002 till the date of termination of his services w.e.f. 17-12-2003. The Union contended that his services were orally terminated by the Employer w.e.f. 17-12-2003 with immediate effect without giving him opportunity to defend himself nor issued to him one month notice or one month pay in lieu of notice, retrenchment compensation etc. and hence the termination of his service is in violation of Sec. 25-F of the I. D. Act, 1947 and the rules made thereunder. The Union in support of its case examined the Workman. On the contrary, the Employer in its written statement filed in the present proceedings contended that the Workman had admitted that he had taken away one empty drum belonging to it from its factory premises without its consent or knowledge. The Employer contended that after taking view of the entire matter and taking into account the admission of the guilt by the Workman as aforesaid, it has terminated the services of the Workman by way of

discharge simplicitor as the Workman's further retention in the employment would not be conducive to its working. The Employer contended that the said termination of service of the Workman does not cast any stigma on the Workman. The Employer has however failed to examine any of the witness in support of its aforesaid contention.

25. The oral evidence of the Workman on record indicates that on 17-12-2003 at around 12.00 hrs. when he was on duty, the Manager of the Employer informed him that his services are not required any further and that his services stands terminated and that he should not report for work henceforth. The Workman also deposed that he was not allowed to resume his duties on 17-11-2003 after 12.00 hrs. The aforesaid oral evidence adduced by the Union on record indicates that the services of the Workman has been orally terminated by the Employer w.e.f. 17-12-2003 without complying with the principles of natural justice nor issued to him one month notice or one month pay in lieu of notice, retrenchment compensation etc. It is the contention of the Employer that the Workman was served with the said letter/order of termination by its Manager on 16-12-2003 in the forenoon alongwith notice in lieu of pay, retrenchment compensation and salary till 16-12-2003 in cash in the presence of Shri Dnyaneshwar Dangle and that on serving the said letter/order of termination of final settlement of dues in cash as aforesaid, the Workman refused to accept the same and left its factory premises. The aforesaid contention of the Employer does not appear to be correct as in the first place the Employer failed to prove its aforesaid contention either by examining any suitable witness or by way of effective cross-examination of the Workman. Secondly, nothing prevented the Employer to serve the said letter of termination and final settlement of dues of the Workman by any other effective mode of communication, if the Workman allegedly refused to accept his final settlement of dues in cash. Hence, it is held that the Employer failed to prove that it has terminated the services of the Workman by way of discharge simplicitor by tendering him his one month pay in lieu of notice, retrenchment compensation and salary till 16-12-2003 in cash in the presence of Shri Dnyaneshwar Dangle, however the Workman refused to accept the same. Thus, the evidence on record indicates that the services of the Workman has been terminated by the Employer w.e.f. 17-12-2003 and the said termination of the services of the Workman is in violation of mandatory provisions of Sec. 25-F of the I D. Act, 1947. Hence it is held that the action of the Employer in refusing employment to the Workman w.e.f. 17-12-2003 is illegal and unjustified. The issue No. 3 is therefore answered in the affirmative and issue No. 4 is answered in the negative.

Issue No. 5:

26. Ld. Adv. Shri G. B. Kamat representing, the Employer in synopsis of written Arguments relied upon the following decisions of Hon'ble Supreme Court of India in support of its submission that even if the termination of service is held to be illegal and unjustified, the Workman is not automatically entitled to reinstatement with full back wages and grant of full back wages will depend on number of factors.

27. In the case of **'U. P. STATE BRASSWARE CORPN. LTD. & ANR. v/s. UDAI NARAIN PANDEY'** reported in **2006 (1) L.L.N., 125, the Hon'ble Supreme Court** held as under:

".....17. Before adverting to the decisions relied upon by the learned counsel for the parties, we may observe that although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is been taken by the Court realizing that an industry may not be compelled to pay to the Workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the Workman was retrenched..." The Hon'ble Court further observed that *"a person is not entitled to get something only because it would be lawful to do so. If that function is applied, the functions of an industrial Court shall loose much of its significance. The Court therefore emphasized that while granting relief application of mind on the part of the industrial Court is imperatives. Payment of full back wages, therefore, cannot be the natural consequences".*

28. In the case of **General Manager, Haryana Road Ways v/s Rudhan Singh** reported in **2005 (3) L.L.N. 754,** the Hon'ble Supreme Court of India has held that, *"there is no rule of thumb that in every case where the industrial tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and the method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting application from the employment exchange, nature of appointment, namely, whether*

ad hoc, short term, daily wage, temporary, or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors which has to be taken into consideration, is the length of service, which the Workman had rendered with the employer. If the Workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by the Workman is very small, the award of back wages for the complete period, i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily wage employment though it may be for 240 days in a calendar year.

29. In the case of **'North East Karnataka Road Transport Corporation v/s M. Nagangouda'** reported in **2007 (1) L.L.N. 582**, the Hon'ble Supreme Court of India has held that *"we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self-employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated the end use being the same. Since the respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment".*

Thus it is the settled principle of law that even if the termination of service of the Workman is held as illegal and unjustified, he/she is automatically not entitled to reinstatement with full back wages.

30. In the case in hand, the Workman was in the employment of the Employer as "helper" w.e.f. 01-08-2002 till the date of termination of his service w.e.f. 17-12-2003. The Union has pleaded that the Workman is unemployed from the date of his termination of service and does not have any source of income. The Union has examined the Workman as its sole witness. The Workman in his oral evidence on record deposed that he is unemployed since after the termination of his services by the Employer and that he had made efforts to secure an employment in an around Ponda Taluka in various factories and other establishment. However, he could not produce any documentary evidence in support of his oral contention. He also deposed that presently he is working as agricultural labourer and earning ₹ 150/- per working day and the said work of agricultural labourer is seasonal. On the contrary, the Employer has failed to adduce any contrary evidence to prove the gainful employment of the Workman and/or the Workman had committed misconduct. Thus taking into consideration the various factors such as age, qualification of the Workman, nature of his employment, duration of employment & income derived by him as an agricultural labour etc., in my considered view, a relief of reinstatement alongwith 30% of back wages will meet the ends of justice.

In the circumstances, I pass the following order.

ORDER

1. It is held that the action of the Management of M/s. Mangesh Plastics Private Ltd., Bethora Industrial Estate, Ponda-Goa in refusing the employment to Shri Kedar T. Gaonkar, (Worker Grade) with effect from 17-12-2003, is illegal and unjustified.
2. The Management of M/s. Mangesh Plastics Private Ltd., Bethora Industrial Estate, Ponda-Goa, is hereby directed to reinstate the Workman alongwith 30% of back wages with immediate effect.
3. No order as to costs.
4. Inform the Government accordingly.

Sd/-
(Suresh N. Narulkar),
Presiding Officer,
Labour Court-II.

Notification

No. 28/1/2012-LAB/128

The following award passed by the Industrial Tribunal and Labour Court-I at Panaji-Goa on 01-02-2012 in reference No. IT/29/2008 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 15th March, 2012.

IN THE INDUSTRIAL TRIBUNAL AND
LABOUR COURT
GOVERNMENT OF GOA
AT PANAJI-GOA

(Before Smt. Bimba K. Thaly, Presiding Officer)

Ref. No. IT/29/2008

Ms. Priti A. Soiru,
Rep. by the General
Secretary,
Gomantak Mazdoor Sangh,
Ponda-Goa. … Workman/Party I

V/s

M/s Adlabs Films Ltd.,
(FM Radio Initiative)
(Big 92.7 FM),
1st Floor, Hotel Neptune Deluxe,
Opp. Municipal Market,
Panaji-Goa. … Employer/Party II

Adv. Shri S. Gaonkar for Party I/Workman.

Adv. Shri G. K. Sardessai for Party II/Employer.

AWARD

(Passed on 1st day of February, 2012)

This is a reference u/s 10(1) (d) of the Industrial Disputes Act, 1947 (for short The Act).

2. The facts of the present reference are as under:

The Government of Goa in exercise of powers conferred on it by Section 10 (1) (d) of The Act, under order dated 9-9-2008 has referred the following dispute for adjudication by this Tribunal.

1. Whether Ms. Priti A. Soiru, Radio Jockey, could be construed as 'workman' as defined under clause (s) of the Industrial Disputes Act, 1947 (14 of 1947)?

2. If the answer to issue No. (1) above is in the affirmative, then whether the action of the management of M/s. Adlabs Films Limited, (FM Radio Initiative) (Big 92.7 FM), First Floor, Hotel Neptune Delux, Opposite Municipal Market, Panaji, Goa in terminating the services of Ms. Priti A. Soiru, Radio Jockey with effect from 05-10-2007, is legal and justified?

3. If the answer to issue No. (2) above is in the negative, then, what relief the workman is entitled to?

3. Pursuant to issue of notices from this court, both the parties put their appearance before this court. Party I filed statement of claim (Exb. 4) on 12-12-08 stating in short that she was initially employed as Radio Jockey at Goa w.e.f. 28-10-2006; that she was stationed at Goa and the nature of her job was to work with the Company in Radio FM Programmes, to play, relay and broadcast etc., to act as host or co-host of one or more programmes, to select the music, scripting and presenting radio shows, to write scripts for shows and should be aware about the latest movies and songs, to deal with sound equipments and computers, to announce the programmes, to interview the guests, present the news, sports and collect and give the weather information, to make the announcement as well as operate the control board used for broadcasting and to raise the funds by selling commercial time to the advertisers.

4. It is the case of Party I that though her daily working hours were from 9.30 a.m. to 6.00 p.m., everyday for preparation of show she had to come at 8.00 a.m. on many occasions and to continue work beyond 6.00 p.m. That she was offered a monthly wage of Rs. 15,000/-. That besides the duties mentioned above she was carrying out the duties of checking the emails received from Mumbai, preparing, making additions and changes in her daily show, to send reply of mails, to fill the log index in computer, to do the work of editing in computer so also the work of back up studio, to keep track on the computer monitoring the show, to carry out the work of outdoor broadcasting so also the work of outdoor recording physically, to carry out the work of editing the script and preparing daily report for submitting to the station head.

5. It is the case of Party I that she had completed 240 days in the month of July, 2007 however the station head started harassing her and from 21-7-2007 she was not allowed to perform her show in the studio but she continued to carry out other work. That when the station head stopped her programmes she made representation before Vice-President HR Mumbai but because of this, station head became more wild and started harassing and threatening her with false and fabricated warning letters. Issue was also raised before Asstt. Labour Commissioner as her wages was changed every now and then. That the access of Party I to the studio was blocked on 15-8-2007 and after a week the officials of Party II blocked her email ID. Party I was also issued warning letters dated 8-8-07 and 22-8-07 and on 7-9-07

she was handed over the transfer letter stating that she should report at Solapur Maharashtra with effect from 17-9-07 without mentioning the address and the contact persons name. That Party I went to attend duty at Solapur Maharashtra on 17-9-07 and upon reaching there she could not find the address and also on enquiry it was understood that there was no such Radio FM functioning at Solapur. She then telephoned station head Manisha Tripathi but her call was not received upon which she contacted Vice President HR who told her to contact Renu Puntambekar, Senior Officer HR who upon being contacted stated that she was not aware of the same. It is the further contention of Party I that since there was no FM Station started in the month of September, 2007 she returned to Goa and went to report the duty at Goa but she was not allowed to resume and hence she made complaint before Asstt. Labour Commissioner, Panaji. That during the pendency of dispute Party II terminated her service with effect from 5-10-2008 without holding enquiry and thus principles of natural justice were not followed. It is also her case that after her termination she is unemployed. She has therefore prayed to declare that she is a Workman u/s 2 (s) of the Act; that her termination is illegal, improper and unjustified and to direct the employer to reinstate her with full back wages and continuity in service.

6. The Party II resisted the claim by filing the written statement in which it is stated that Party I is not a Workmen as defined u/s 2(s) of The Act; that her duties and functions exclude her from the purview of the definition of Workman and that this court has no jurisdiction to entertain the present dispute in view of the specific contract signed by both the parties on 27-10-06. It is also the case of Party II that as per clause 8 of Annexure 'C' the dispute if not resolved has to be submitted for arbitration and the seat of the arbitrator shall be at Mumbai and Mumbai courts shall have exclusive jurisdiction and thus even for this reason this court has no territorial jurisdiction to entertain this dispute. It is also stated in the written statement that Party I from the commencement of the employment as a record of habitual absenteeism, late coming and neglect of duties. Party II has further denied that the work of Party I is of technical nature and hence she is the Workman under the Act. As regards the transfer of Party I to Solapur it is stated by Party II that the transfer is an incident of service and was affected on account of exigencies of work and as per the terms and conditions of the appointment letter the services of Party I are transferable to any office of Party II. A detailed communication briefing about the place and the person to whom the Party I should report was made by email dated 14-9-07. It is further stated that Party I reported at the Company's station at Solapur but left Solapur abruptly and came to Goa and wrote letter dated 25-9-07 expressing her inability to work in Solapur. That by letter dated 5-10-07 Party I was informed that her inability to work at Solapur office or at Goa office was clearly in violation of clause 6 of the terms and conditions of the appointment letter dated 20-10-2006 by further informing that her services stood terminated in terms of clause 6 of the appointment letter and she was offered dues by way of notice pay and retrenchment compensation @ 15 days for each completed year of service purely as a matter of abundant caution and on humanitarian ground though Party II was not obliged to pay the same as the Party I was not a workman. Thus according to Party II the termination of services of Party I was legal and justified and there was no case for reinstatement or for back wages. Party II has also denied that Party I was asked to carry out the duties as stated by Party I in para 4 of the claim statement. Party II has however denied the other allegations levelled by Party I against it.

7. Rejoinder was then filed by Party I denying the averments in the written statement of Party II.

8. Based upon the above pleadings the following issues which are at Exb. 12 have been framed:

1. Whether the Party I proves that she is the "workman" within the meaning of section 2(s) of the Industrial Disputes Act, 1947?
2. Whether the Party I proves that she was transferred to Solapur, when there was no FM Station at Solapur?
3. Whether the Party I proves that on returning to Goa she was not allowed to resume duties?
4. Whether Party I proves that her termination is illegal and unjustified?
5. Whether Party II proves that refusal to work at Solapur was in contravention of clause 6 of the appointment letter?
6. What Award?

9. Heard Lnd. Adv. Shri S. Gaonkar for Party I and Lnd. Adv. Shri P. Chawdikar for Party II.

10. I have gone through the records of the case and have duly considered the arguments advanced.

11. My findings on the issues are as under:

Issue No. 1: In the affirmative.
Issue No. 2: In the affirmative.
Issue No. 3: In the negative.
Issue No. 4: In the affirmative.
Issue No. 5: In the affirmative.
Issue No. 6: As per order below.

REASONS

12. Issue No. 1: In his arguments Lnd. Adv. for Party I by inviting my attention to the definition of the term *Workman under section 2(s) of The Act stated that the nature of the duties performed by Party I was "technical" as is apparent from the deposition of Party I wherein she has stated that about the nature of duties she was required to do. He also stated that though Party II has denied that Party I was a workman as defined under Section 2 (s) of the Act they have not given the reason as to why the Party I should not be construed as a Workman. According to him the nomenclature or salary is not criteria to assess the nature of work of an employee.

13. In support of his above submissions he relied on the judgements in **Pam Network Ltd., Corporate office, Banglore v/s D. Balkrishna 2011 1CLR 180** in which it is held that mere nomenclature or salary is not the criteria to assess the nature of work of an employee and whether or not an employee is a Workman u/s 2 (s) of The Act is required to be determined with reference to his principal nature of duties and functions. He further stated that in terms of this judgment such question is required to determined with reference to the facts and circumstances of the case and material on record and it is not possible to lay down any straight--jacket formula which can decide the dispute as to the real nature of duties and functions performed by an employee.

14. He then relied on the judgment in **Chandrashekhar Chintaman Vaidya v/s National Organic Chemical Industries Ltd., Akola 2010 LLR 926** in which it is held that the basic tests for holding a person to be a Workman is to see if the person does menial, ministerial or clerical work, if any or the parts of his duties involves any sort of supervision which is on the material and not on the man, if the part of the supervisory duties, if any, not predominant and that what is to be seen is not the designation and/or nomenclature, but performance of duties. By referring to the case at hand he submitted that Party I herein has been ordered to do the ministerial work and therefore she comes within the definition of Section 2 (s) of The Act.

15. He then relied on the judgment in **Burmah Shell Oil Storage and Distribution Coof India v/s Burmah Shell Management Staff Association and Others 1970 (3) SCC 378** by contending that if the successful execution of the work of the concerned depends mainly upon the display of taste or imagination or the exercise of some special mental or artistic faculty or the application of scientific knowledge as distinguished from manual dexterity, the person is said to have employed to do technical work. He also relied on the judgment in **Bombay Dying and Manufacturing Company Ltd. v/s R. A. Bidoo and Anr in writ petition No. 6026/1987, High Court of Judicature Bombay** in which it is observed as under:

"A person can be said to be employed in a technical capacity if he is in the first place, a skilled person. He must have enough dexterity to discharge the work assigned to him with speed and accuracy. He must also have a skill, but that skill is'not a general skill like that of a weaver who is in charge of several looms in a textile unit. Such a weaver is skillful enough to look after several looms at one time and if something goes wrong he is able to attend to and mend the same. But he is not employing any knowledge or art in which has been trained or in which he had some education formal, or otherwise in the case of a person employed in a technical capacity, the application of a knowledge of a particular craft or work is the distinguishing feature. With the assistance of knowledge a person employed in a technical capacity is able to bring about a result which could not be brought about by a person, however skilled, who is to perform routine, repetitive work....."

16. Vis-à-vis the above observations he invited my attention to the cross examination of Party I wherein she has stated that she was given training at Bombay in respect of how to operate machine, editing on computers, writing of scripts and how to talk with people. He also submitted by referring to the cross examination of Ms. Rasika Bakshi the witness of Party II that preparing byte as admitted by this witness is also the part of the Radio Jockey so also the knowledge of operating mike and console is necessary for a Radio Jockey and hence considering the above nature of duties which are purely of technical nature in the light of the observations in the aforesaid judgments, Party I has to be considered to be a Workman under of Section 2(s) of The Act.

17. Lnd. Adv. for Party I then relied on the judgment in **Marshal Braganza v/s S. R. Samant (1975) II LLJ 189 Bombay** contending that the test of substantial work performed by the employee concerned is to be applied to find out as to whether the employee is employed to do skilled, unskilled, manual work, supervisory work, technical work or clerical work etc., and it is the nature of the duties which an employee has to perform primarily and not his designation that can determine whether he is a Workman of a particular category or not. It may be mentioned here that the petitioner herein was a cameraman and thus considering the nature of his duties it was held that he falls within the meaning of the definition of the word **"Workmen"** as defined in Section 2(s) of The Act.

18. He then relied upon the Judgment in **Arun Mills LTD v/s Dr. Chandraprasad C. Trivedi (1976) 17 GLR 291** contending that the word "Technical" means the art which requires a specialized knowledge of a particular branch i.e. a Technical art and one who professes such a technical art is called a person employed in a technical work. It may be mentioned here that the person concerned in this case was working as a doctor and he was thus held to be a Workmen in terms of Section 2(s) of The Act.

19. He also relied on the judgment in **Maheshwar Singh v/s Indomag Steel Technology Ltd., 2010 II CLR 431** contending that the job of a craftsmen comes within the ambit of Section 2(s) of The Act. In this case the petitioner was working as draftsman and was preparing drawings with the help of engineers of the organization and thus he was held to be a Workman by considering the nature of the duties performed by him.

20. Thus on the basis of aforesaid judicial pronouncements viz-a-viz the evidence in the case at hand Ld. Advocate for Party I submitted that Party I herein is therefore a Workmen under Section 2(s) of The Act.

21. On the other hand Lnd. Advocate for Party II referred to the Judgement in **Standard Chartered Bank v/s Vandana Joshi and other 2010 I CLR 163** which judgment of the Hon'ble Single Judge of Hon'ble High Court of Judicature at Bombay has been upheld by division bench in ordinary original civil jurisdiction appeal No. 67/2010 in writ petition No. 975 of 2009, contending that burden lies on the person who asserts the status of a Workmen under Section 2(s) to establish with reference to the dominant nature of his/her duties that the work which is performed falls within the stipulated categories in Section 2(s). By referring to this judgment he further stated that the balance has to be drawn on the basis of overall duties and responsibilities performed and the dominant nature of the work performed by an employee. In this case the person concerned was working as 'Personal Financial Consultant' with the petitioner bank however considering the nature of her duties which were not stereotypical but were having element of initiative or creativeness, she was held not as a Workmen under Section 2(s) of The Act.

22. He also relied on the judgment in **Burma Shell Oil Storage and Distributing Co**. of India (supra) contending that a person cannot be assumed to be a Workman under the ground that he does not come within the four exceptions of section 2(s) and that it is essential to determine under which specification of the types of work in the definition of the section 2(s) he will fall for the purpose of finding out whether he does or does not go out of the definition of "Workman" under exceptions.

23. He then relied upon the judgment in **Shri Vishnu P. Kamat v/s Presiding Officer, Industrial Tribunal Panaji, Goa in Writ Petition No. 167/99, High Court of Bombay at Goa** in which the petitioner was performing the duties of supervisory nature and therefore he was not held as "Workman" under Section 2(s) of The Act.

24. He also relied on the judgement in **C. Gupta v/s Glaxo-Smithkline Pharmaceuticals Ltd. (2007) 7 SSC 171** contending that nomenclature is of no consequence and whether a particular employee comes within the definition of a Workman has to be decided factually. In this case the appellant was appointed as "Industrial Relations Executive" and the duties undertaken by him overwhelmingly fell within the managerial cadre and therefore he was held as not coming within the definition of "Workman".

25. Section 2(s) of The Act defines "Workman" as under:

> *"Workman means any person (including an apprentice) employee in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute,*

includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison, or

(iii) who is employed mainly in a managerial or administrative capacity, or

(iv) who, being employed in a supervisory capacity, draws wages exceeding (ten thousand rupees) per mensem or exercises, either by their nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

26. It cannot be disputed that the party who claims to be a Workman under Section 2(s) of The Act has the initial burden to discharge that he or she does the type of works enumerated in the first part of the definition of Section 2(s). Reference is made to the judgment in **H. R. Adyanthaya v/s Sandoz (India) Ltd. 1994 (69) FLR (SC)** in which it is held that even if it is proved that complainant does not do any managerial or supervisory work unless it is proved that he does work of the nature of manual, supervisory, technical and clerical, he does not become a Workman under section 2(s) of the Industrial Disputes Act. It may be mentioned here that it is the precise case of Party I herein that the nature of her work as Radio Jockey was technical and therefore she is a Workman u/s 2(s) of The Act. Undoubtedly, as held in the judgment in **Chandrashekhar Chintaman Vaidya and Pam Network (both cited supra)** while coming to the conclusion if a person is Workman or not what is to be seen is not the designation and/or nomenclature but performance of duties,

27. Party I has stated in para 1 of her affidavit the duties which she was required to perform as a Radio Jockey and the same are as under:

a) To work as with the company in Radio FM Programmes, to play relay and broadcast etc.

b) To act as host or co-host of one or more programs.

c) To select the music, scripting and presenting radio shows.

d) To write scripts for shows and should be aware about the latest movies and songs.

e) To deal with sound equipment and computers.

f) To announce the programs, to interview the guests, present the news, sports and collect and give the weather information.

g) To make the announcement as well as operate the Console Board which is used for broadcasting.

h) To raise the fund by selling commercial time to the advertisers.

28. In para 4 of her affidavit Party I has stated that besides the above duty she was asked to carry out the following duties:

a) Checking the emails received from Mumbai, which give day-to-day updates of Mumbai big FM station program.

b) After checking the mail she has to prepare, make addition and changes in her daily show as per inputs and instructions received by email.

c) To send the reply of mails received if called for from the Mumbai office.

d) To fill the Log Index in computer.

e) To do the work of editing in the computer.

f) To do the work of Bank up studio.

g) To keep the track on computer (next gen Computer where full show is loaded) monitoring the show until the concluding of the show timings i.e. 2 p.m. to 6 p.m.

h) To carry out the work of outdoor broadcasting.

i) To carry out the outdoor recording physically with the help of outdoor broadcasting Van provided by the Party II.

j) To carry out the work of editing the script after outdoor recording for keeping it ready for next show.

k) Preparation of daily report for the purpose of submitting the same to the Station Head.

29. It cannot be disputed that a Workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other type of work. Since Party I herein has stated that she was employed as Radio Jockey by mentioning the duties which she was required to do as such in

para 1 of her affidavit, it can be safely gathered that the duties mentioned in para 4 of her affidavit are the additional duties and hence such duties cannot be examined to find out the actual nature of work done by Party I.

30. It is clear from the duties enumerated by Party I in para 1 of her affidavit that one could have performed such duties only upon training to perform them. It may be mentioned here that the contents of para 1 of the affidavit of Party I are not denied in her cross examination. On the contrary it is brought on record in the cross examination of Party I that prior to joining her duties as Radio Jockey she underwent training at Bombay in respect of how to operate machine, editing on computers, writing or scripts and how to talk to people. It is also evident from the cross examination of Party I that she has studied till L.L.B and therefore it is clear that the basic education of Party I was not in the same field where she had been working as Radio Jockey. Being so, I find force in the arguments of Lnd, advocate for Party I that without above training it would not have been possible for Party I to work as Radio Jockey.

31. In the above context, cross-examination of Ms. Rashika Bakshi, the Asstt. Manager (Legal) of Party II examined as witness of Party II gains significance since she has stated that the knowledge of operating mike and console is necessary for a Radio Jockey: that hosting on air is a part of the job of a Radio Jockey and that she was aware that Party I was hosting show on air. No doubt, this witness has also stated that she does not know whether Party I was required to supervise the work of any particular employee or she had powers to sanction the leave but since it is not the case of either of the parties that Party I had powers to supervise the work or sanction the leave as above, the above statements made by the witness of Party II are of no significance to find out if Party I is a Workman u/s 2(s) of The Act.

32. In the judgment in **Burma Shell Oil Storage (supra)** it is held that if the successful execution of the work of a person depends mainly upon the display of taste or imagination or the exercise of some special mental or artistic faculty or the application of scientific knowledge as distinguished from manual dexterity the said person has to be considered as employed to do technical work. It is also held in this judgment that the work of such persons depends upon special mental training or scientific or technical knowledge or if he is employed because he possesses such faculties and they enable him to produce something as a creation of his own, he will have to be held to be employed on technical work, even though in carrying out that work, he may have to go through a lot of manual labour. It is apparent from the evidence of Party I that she used to write script on her own; used to make appeal to the public while conducting the shows to send SMS and used to get good response from the public and that as Radio Jockey she was responsible to conduct the programme to achieve better results for Party II. She has also stated that she used to take active participation in different programmes which were broadcasted and while conducting the selected programmes they were required to be accurate and to have commitment towards presentation. From the above statements of Party I it becomes clear what was required of her in acting as Radio Jockey while performing aforesaid duties was skill, technical knowledge, special mental training and element of creativity. I have already pointed out above that during the training at Bombay, Party I has learnt to operate machine, editing on computer etc. and therefore as observed in judgment Burma Shell supra the above work of Party I requires technical knowledge and hence Party I has to be considered as employed to do technical work.

33. In the judgement in **Marshall Braganza supra** the person concerned was working as cameraman and as cameraman his duty was to discuss some technical points with the director but he used to take final decisions. His duty was also to translate the ideas of the Director and to produce the necessary effects in the film. Amongst other duties he had also to do physical checking of camera, operate the camera to see that fitters are correctly used and the diffusers are adjusted to give a desired effect. He was also required to interpret the ideas of the Director and produce all necessary effect in the film and had to take all technical decisions to bring out the visual image. It was therefore held that the execution of the work of a cameraman involves special technical knowledge and that the nature of his work indicated that successful creation of reality in a motion picture depended upon the display of the imagination of the cameraman, the exercise of his artistic faculty and the application of technical knowledge as distinguished from manual dexterity and therefore by relying on the observations in the judgment in Burma Shell [supra], the cameraman in this case was held as a Workman as defined in Section 2(s) of The

Act. In the instant case, considering the nature of duties performed by Party I and for which purpose she had to undergo training in technical work, I am of the opinion that Party I has succeeded in establishing that the nature of her work was "technical".

34. In the judgement in **Standard Chartered Bank (supra)** the person concerned i.e. the respondent was appointed as "Personal Financial Consultant" and her key responsibilities were as under:

(1) Achieve allocated business targets and actively cross sell Consumer Banking products and third party products,

(2) Generate new business via sales promotions, outmarketing calls and presentations and in branch contacts,

(3) Participate actively in branch sales planning to generate action plans for meeting targets,

(4) Ensure high level of customer service in the Branch, Manage difficult customer situations,

(5) Ensure compliance with internal and external guidelines and ensure minimal comments in audits and other inspections,

(6) Ensure transactions are processed with a high level of accuracy and commitment in order to satisfy customer needs,

(7) Ensure validity and completeness of transactions processed and ensure concessions relative to exchange rate, fees, charges etc. are authorized/overriden by appropriate authorities,

(8) Take responsibility for general reconciliation and control activities,

(9) Find ways to improve operational efficiency and control costs to meet cost budgets,

(10) Gather/prepare statistics for service quality and productivity indicators,

(11) Active participation in branch sales planning to generate action plans for meeting targets,

(12) Responsible for general reconciliation and control activities,

(13) Be multi-skilled to handle all kinds of transactions and service bank,

(14) Manage attrition of the base.

35. The services of the above-mentioned respondent were terminated by the bank pursuant to which reference for adjudication was sought to the Industrial Tribunal. Reading of this judgment indicates that in the claim statement the respondent did not mention that her duties were of clerical nature though subsequently in her rejoinder it was stated that the work which was being rendered by her was "basically clerical in nature". It is observed in this judgement that the respondent was required to be multiskilled to handle all kinds of transactions and services in the bank. By referring to the judgment in **M/s Sonepat Co-operative Sugar Mills Ltd., v/s Ajit Singh 2005 II CLR 66,** it is observed in this judgment that the job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. It is further held that the dominant nature of the work or duties for which respondent was engaged cannot be regarded as stereotypical and without an element of initiative or creativeness which is the test elucidated in the judgment in Sonepat (supra). It is therefore held that the duties and responsibilities that were attached to the job of the respondent were not of a clerical nature since an employee was engaged in contributing to the business of the bank and was recruited to perform the duties which cannot be regarded as of clerical nature.

36. No doubt, what becomes apparent from the above observations is that if the work of the person concerned is not a stereotypical work and that it involves initiative and creativeness, the person concerned cannot be considered as a Workman, but, one cannot loose sight of the fact that the observations in this judgment were made viz--a-viz, the case of the respondent wherein she had claimed that the nature of her work was clerical. It was not her case that the nature of her work was technical and therefore strictly speaking merely because a comparison has been drawn between the clerical work and the work involving initiative or creativeness, one cannot draw the conclusion that the above observations would apply also to a case in which the person concerned claims that the nature of her work is technical. This is because, in terms of the observations in the judgements in **Burma Shell and Marshell Braganza (both cited supra)** it becomes clear that if the work depends upon special mental training or scientific or technical knowledge the same has to be considered as the technical work. It is worthwhile noting that it is not the case of the respondent in the case of **Standard Chartered Bank (supra)** that before appointing as "Personal Financial Consultant" she had undergone any

training as had been undergone by Party I in the instant case and therefore it is clear that the work of respondent did not depend upon special mental training or scientific or technical knowledge as in the case of Party I. Thus, I am of the considered opinion that the observations in the judgement in Standard Chartered Bank (supra) cannot be imported in the case at hand to say that Party I herein does not come within the ambit of the definition of Section 2(s) of the Act.

37. Lnd Adv. for Party II by inviting my attention to the terms and conditions of the employment (Annexure 'B' of Exb. 13 colly) contended that in terms of clause (c) of this annexure Party I could make any discovery, invention, process or improvement or any work and therefore it is clear that she could independently deal with her work and hence there was no any control over the work performed by Party I.

38. He also referred to cross examination of Party I on above subject by stating that it is admitted by Party I that she made personal discoveries, inventions while doing her work and that it was her full responsibility to present her own show as RJ. It may be mentioned here that clause (c) of the terms and conditions of employment (Annexure B Exb. 13 colly) makes it clear that such discoveries, inventions or process or improvement of work made or discovered by Party I would belong absolutely to and be the sole and absolute property of the Company. Undoubtedly, the Party I was employed by Party II by virtue of terms and conditions at Exb. 13 colly and therefore as rightly submitted by Lnd. Adv. for Party I there is employer--employee relationship between the parties. It therefore follows from above that whatever discoveries, inventions etc. were done by Party I in the course of her duties absolutely belong to Party II and that she does not have independent control over the same.

39. That apart, the judgment in the case of Standard Chartered Bank (supra) also states that the fact that in an organizational structure the employee, in the course of the decision making process, is subject to checks and balances is not a matter which would establish that she/he is a Workman within the meaning of Section 2(s) and that modern forms of business in corporate organization put into place a carefully crafted process of checks and balances. Hence merely because Party I herein was having the responsibility of conducting the programme or that she was having overall control on her work, it would not be proper and justified to say that Party I is not a workman and this is because the same by itself is not a criteria to decide the nature of the work done by the concerned party.

40. Be that as it may, learned advocate for Party I by inviting my attention to the Annexure 'D' at Exb. 13 colly relating to "RADIO JOCKEY ADDITIONAL OBILIGATIONS AND TERMS AND CONDITIONS OF EMPLOYMENT" and more particularly para 7(a) of the same submitted that the services of Party I are in the nature of "work for hire" and therefore she is a workman under Section 2(s) of the Act. I find force in the above submissions of the learned advocate for Party I since the above documentary evidence suggests so.

41. It is one of the arguments of learned advocate for Party II that in terms of Annexure 'A' at Exb. 13 colly relating to "COMPENSATION", the compensation to be paid to Party I was Rs. 1,80,000/- per annum (cost to company). Thus according to him there was no agreement of payment of monthly salary to Party I. He also invited my attention to pay slips of Party I at Exb.14 colly to state that the net pay of Party I in all these slips varies and is not constant and this is because Party I was not paid a fixed monthly salary but it was cost to company (CTC). Further by referring to the cross examination of Party I wherein she has stated that she was not receiving any additional amount towards overtime charges or the work done on Sundays he stated that since no monthly salary was paid to Party I and also as no overtime charges were paid to Party I which otherwise would have been in case Party I was a Workman, the Party I cannot be construed as a Workman. In the above context, I would refer to the observations in the judgment in Pan Network Ltd., (supra) in which it is held that mere nomenclature or salary is not the criteria so assess the nature of work of any employee to find out if he is a Workman under Section 2 (s) of the Act. As regards the contention learned advocate for Party II that since Party I was not paid overtime wages she cannot be held as a Workman, it is noted that no such defence has been raised by Party II in the written statement and therefore strictly speaking it is now not open to Party II to advance such arguments and even otherwise as pointed out by learned advocate for Party I there is nothing in the definition of Section 2(s) of The Act stating that if a person is not paid overtime wages he/she cannot come under the said definition.

42. It therefore follows from above discussion that Party I has proved this issue and hence I answer it in the affirmative.

43. Issue No. 2: It is stated by Party I that on 7-9-07 her transfer letter was handed to her after duty hours at 06.42 p.m. stating that she should report at Solapur-Maharashtra w.e.f. 17-9-07, however address and the contact persons name was not disclosed even after her repeated requests. She has produced the said transfer letter dated 7-9-97 at Exb.17. In her cross examination Party I has stated that she had acknowledged the receipt of Exb. 17 and had orally informed the accountant, office head and the vice president HR that she should be given correct address of Solapur office where she was required to report. She has stated in her affidavit in evidence that she went to attend duty at Solapur-Maharashtra on 17-9-07 alongwith her 18 months old child and on reaching there searched the address but could not find the same and on inquiry she came to know that there is no such Radio FM in the name and style as Party II, commenced its functioning in Solapur. The above statement of Party I is not denied in her cross examination. She has also stated that on the same day she called the station head Goa, Smt. Manish Tripati on phone but her call was not received and therefore she called Ms Renu Putambekar, Sr. Officer HR who informed her that she was not aware of the same and when it was brought to her notice that transfer order was signed by her, she remained mum. Perusal of the cross examination of Party I also reveals that she went to Solapur without proper address of office but thereafter contacted Renu and managed to get the office address. In the above context perusal of cross examination of Rasika Bakshi, the witness of Party II also makes it clear that the 92.7 Big FM went on air at Solapur station in November 2007; that Party II had obtained permission from Ministry of Information and Broadcasting in February 2007 to commence the station and that Solapur station was launched on air on 8-11-2007. She has further stated in her cross examination that all the employees whether they are experienced employees on transfer or the new recruits are required to report to the station after it is set up. It is therefore clear from abovestatement of witness of Party II that, FM station at Solapur was not launched on air in September 2007 though permission from Ministry of Information and Broadcasting was obtained in February 2007 to commence the station. It is however not the case of Party II that pursuant to obtaining such permission from the Ministry of Information and Broadcasting any office was set up by Party II at Solapur. Even otherwise, setting up of office of Party II and commencing FM station by Party II at Solapur are two different aspects independent of each other and therefore no any adverse inference could be drawn against Party I on the basis of the statement made by her in her cross examination that she managed to get the office address after contacting Renu. Being so, it is clear that Party I has proved that she was transferred to Solapur where there was no FM station and hence this issue is answered in the affirmative.

44. Issue No. 3: The Party I has stated that since there was no FM station started in the month of September 2007 she came to Goa and went to report for duty but she was not allowed to resume the duty and hence she made complaint before the Asst. Labour Commissioner, Panaji upon which both parties were called for conciliation on several occasions. She has also stated that during the pendency of dispute before the authority, Party II has terminated her services w.e.f. 5-10-08. She has produced the copy of her complaint dated 25-9-07 made to Deputy Labour Commissioner at Exb.19. In her cross examination she has stated that she returned to Goa from Solapur on 19-9-07 and immediately thereafter sent a mail to Party II stating that she wont be able to join the office till Friday and that she will be reporting for duties from Monday onwards. She however seemed not to recollect the exact date on which she reported for duty after coming from Solapur though according to her she had joined the first Monday after 17-9-07. Nonetheless, in her further cross examination she has made it clear that she lastly attended the office on 13-9-07 and left the office at around 1.00 p.m. after signing the register. It is therefore clear from the above satement of Party I that her statement that she had joined the office on the first Monday after 17-9-07 cannot be believed. Even otherwise perusal of Exb. 19 makes it clear that there is nothing in it stating that Party I joined the office after coming from Solapur but she was not allowed to resume the duties. This is because in Exb. 19 she has stated that she came back to Goa mainly because her child was not used to the climatic conditions at Solapur and also that considering her present mental state, inconvenience, tension caused to her tender infant child and her family she wont be able to join Panaji office in fear of more harassment to her by Mrs. Manisha Tripati. This being the case, it is clear that the Party I did not join the office of

Party II at Panaji after returning from Solapur and consequently her case that on returning to Goa, she was not allowed to resume the duties cannot be believed. Hence this issue is answered in the negative.

45. Issue Nos. 4 and 5: Both these issues are answered together for the sake of convenience as they are interconnected and to avoid repetition of facts.

46. I have already pointed out in the discussion while answering the issue No. 3 that Party II terminated the services of Party I w.e.f. 5-10-08 during the pendency of the dispute before Labour Commissioner, Panaji. In their written statement it is the case of Party II that before termination of the services of Party I no enquiry was required to be conducted as Party I was not a Workman and therefore there was no violation of principles of natural justice. It is therefore clear from above that the services of the Party I were terminated without holding an enquiry and therefore such termination is illegal and unjustified.

47. I have already answered issue No. 1 by holding that Party I is the Workman within the meaning of section 2 (s) of The Act and thus the above defence of Party II cannot at all be considered. It is otherwise apparent from the defence of Party II that the services of Party I were terminated, as she did not join the place of her transfer and has committed misconduct. Party I has produced the order of termination dated 5-10-2007 at Exb. 20 which indicates that the services of Party I were terminated on account of violation of clause 6 of the TERMS & CONDITIONS OF EMPLOYMENT at Annexure 'B' of the appointment letter dated 20-10-2006. viz-a-viz above, reading of clause 6 of Annexure 'B' of Exb. 13 colly makes it clear the Company was empowered to terminate the employment without notice if the employee was found guilty of (i) any act of disloyalty commission of an act involving moral turpitude and act of indiscipline or inefficiency, or (ii) willful breach of the terms of this appointment letter, including the annexures hereof and policies, procedures, declarations, service rules or other rules and regulations including conduct, discipline and administrative orders of the company or (iii) dereliction of duty, or (v) willful negligence or disobedience of lawful or reasonable orders or instructions or the rules or regulations received by you from time to time or (iv) conduct on or off duty, which is prejudicial to the interest, good name and reputation of the company, or (vi) furnishing or suppressing false material information or declaration..... It is therefore clear from the above that the services of the Party I were terminated by Party II as she had committed misconduct in terms of above clause.

48. Lnd. Adv. for Party I relied on the judgment in **Novartis India Ltd. v/s State of West Bengal and Ors. 2009 SCLJ 461** (SC) in which it is observed as under;

> *"When an employee does not join at his transferred place, he commits a misconduct. A disciplinary proceeding was, therefore, required to be initiated. The order of discharge is not a substitute for order of punishment. If an employee is to be dismissed from services on the ground that he had committed a misconduct, he was entitled to an opportunity of hearing. Had such an opportunity of hearing been given to them, they could have shown that there were compelling reasons for their not joining at the transferred places. Even a minor punishment could have been granted. Appellant precipitated the situation by passing post haste order of termination of their services".*

49. Thus, in the above case the termination of the services of the employee was held to be illegal as prior to issuance of the orders, no enquiry had been conducted and the order of discharge was held as void ab initio.

50. Since in the instant case the services of Party I have been terminated without conducting any enquiry the said termination order is also void ab initio.

51. Thus, though Party II contravened clause 6 of the appointment letter, in the light of the judgment in Novartis India (supra) it was not open to Party II to terminate her services without holding an enquiry.

52. In view of above discussion both these issues are answered accordingly.

53. *Issue No. 6:* In her claim statement the Party I has also prayed to direct the employer to reinstate her with full back wages and continuity in services. In view of discussion in the aforesaid paras the question therefore that falls for my determination is to what relief the Party I is entitled to. Letter of appointment at Exb. 13 colly and more particularly clause 5 of Annexure C of 'CONFIDENTIALITY AGREEMENT' reads as under:

Terms or Termination or Survival:

This agreement shall be effective from 28-Oct-06 ("Effective Date") and the Receiving Party's obligations under this Agreement shall terminate automatically upon the expiry of three (3) years from the date of termination of the said Agreement(s).

54. It is therefore clear from above that the agreement of employment between Party I and Party II was only for a period of three years commencing from 20-10-06 and in normal circumstances it would expire on 28-10-2009.

55. In the case of **Incharge Officer & Anr v/s Shankar Shetty 2010(9) SCC 126 and Senior Superintendent Telegraph (Traffic) Bhopal v/s Santosh Kumar Seal & Ors AIR 2010SC 2140,** the Apex Court has reiterated that *"It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice."*

56. In the light of above settled position of law viz-a-viz the fact that the contract period in normal circumstances would expire on 28-10-09, I am of the considered opinion that this is a fit case where compensation instead of reinstatement would meet the ends of justice.

57. In her cross examination Party I has made it clear that as per the contract entered with Party II she could not take up a job elsewhere for a period of three years from the date of contract. It is however noted that there is nothing in the above agreement to indicate that the Party I should not take up a job elsewhere even if her services are terminated. There is nothing in the evidence of Party I indicating that she had made efforts to secure a job. Even for that matter, nothing has been brought on record by Party II to suggest that Party I was gainfully employed after the termination of her services. It cannot be disputed that gainful employment is one of the relevant aspects that needs to be considered while granting the relief and the burden of proving the same is on the employee.

58. In **Kendriya Vidyalaya Sangathan and Another v. S.C. Sharma, (2005) 2 SCC 363** the Apex Court has held that *"... When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim."*

59. Similarly, in the case of **U.P. State Brassware Corporation Ltd. v/s Udai Narain Pandey, reported in 2006 AIR(SC) 586,** the Apex Court has reiterated that *"It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Indian Evidence Act or the provisions analogous thereto, such a plea should be raised by the Workman."*

60. In the light of aforesaid principles, there can be no dispute that the burden was on the Party I to prove that she was not gainfully employed since the date of termination of her services. It is pertinent to note that though Party I herein has stated that she was not employed after the termination of her services, no evidence has been brought on record by her to indicate as to how she was maintaining herself and her child in this interregnum period. This by itself indicates that Party I had some source of income to maintain herself and her child. I have already mentioned above that since the agreement period expired on 28-10-09 it would not be proper and justified to direct Party II to reinstate Party I with full back wages and continuity of services and that monetary compensation would meet the ends of justice. It is evident from the letter of termination dated 5-10-2007 (Exb. 20) that Party II has without admitting that Party I was a 'Workman', paid her Rs. 25,000/- towards notice pay in lieu of notice and Rs. 12,500/- towards retrenchment compensation of 15 days for one year service. Thus, a total amount of Rs. 37,500/- was paid to Party I under above heads vide Exb. 20. That apart, as pointed out by me supra, if not terminated Party I, would have in normal circumstances continued in the employment till 28-10-09 and considering these aspects, I am of the opinion that awarding compensation of Rs. 2,00,000/- to Party I in lieu of reinstatement shall be appropriate, just and equitable.

Under the circumstances and in view of discussion supra, I pass the following order:

ORDER

1. The action of the management of M/s Adlabs Films Limited, (FM Radio Initiative) (Big 92.7 FM), First floor, Hotel Neptune Delux, Opposite Municipal Market, Panaji, Goa, in terminating the services of Ms. Priti A. Soiru, Radio Jockey w.e.f. 05-10-07, is held to be illegal and unjustified.

2. The Party II is directed to pay to Party I monetary compensation of Rs. 2,00,000/- (Rupees Two Lakhs only) within two months from the date of publication of Award failing which the same shall carry interest at the rate of 9% p.a.

3. Inform the Government accordingly.

Sd/-

(B. K. Thaly),
Presiding Officer,
Industrial Tribunal-
-cum-Labour Court.

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Department of Personnel

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Order

No. 3/1/80-PER/Vol.II

In pursuance to the Government of India, Ministry of Home Affairs, New Delhi, Order No. 14020/2/2011-
-UTS-I dated 20-12-2011, the Governor of Goa is pleased to appoint Shri Kishan Kumar, IPS (AGMU: 85), Director General of Police, Goa w.e.f. 22-12-2011 (a.n.) on officiating basis.

Now, in pursuance to the Government of India, Ministry of Home Affairs, New Delhi Order No. 14016/
/6/2011-UTS-I dated 08-02-2012, Shri Kishan Kumar, IPS has been appointed to the post of Director General of Police, Goa w.e.f. 08-02-2012 on regular basis in the pay scale PB–4, ₹ 67,000-79,000.

This issues in supersession of earlier order of even number dated 22-12-2011.

By order and in the name of the Governor of Goa.

N. P. Singnapurker, Under Secretary (Personnel-II).

Porvorim, 28th February, 2012.

Order

File No. 12/3/2011-PER

On the recommendation of the Departmental Promotion Committee, the following officials in the grade of Head Clerk/Sr. Stenographer (Outside Secretariat) are promoted to the post of Superintendent (Outside Secretariat) Group 'C' in the Pay Band—2, ₹ 9,300-34,800+Grade Pay ₹ 4,600/- on regular basis with immediate effect and posted on the post of shown against their names:

Sr. No.	Name of Officer	Post on promotion
1.	Smt. Shalini Khandeparkar	Water Resources Department.
2.	Smt. Inez Viegas e Misquite	Public Works Department.
3.	Shri Govind Nevarekar	Directorate of Technical Education.
4.	Shri Nicoth J. T. Das A. Lobo	Goa Medical College.
5.	Smt. Angela Araujo	Public Health Department.
6.	Shri Digambar D. Sawant	Information & Publicity.
7.	Smt. Eliza Dias	Goa Dental College, Bambolim.
8.	Smt. Ashweta A. Redkar	Government Printing Press.
9.	Smt. Sulaksha Chari	Directorate of Fire & Emergency Services.
10.	Smt. Netra Sardessai	Electricity Department.
11.	Smt. Catharina Fernandes	Department of Commercial Taxes.
12.	Smt. Sandra Desouza	Forest Department.

The above officials shall be on probation for a period of two years.

They shall exercise option within one month from the date of promotion to fix their pay in terms of F.R. 22 (1) (a) (1).

The officials at Sr. Nos. 1, 3, 5, 7, 9, and 11 shall move first.

Further, the following official is transferred and posted on the post shown against his name:

Sr. No.	Name of the Official & present posting	Posted on transfer
1.	Shri Ramakant Talkar, Electricity Department	Town & Country Planning Department.

By order and in the name of the Governor of Goa.

N. P. Singnapurker, Under Secretary (Personnel-II).

Porvorim, 19th March, 2012.

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Corrigendum

No. 6/47/2011-PER

Read: Memorandum No. 6/47/2011-PER dated 01-11-2011.

The date of retirement of Shri R. Mihir Vardhan, indicated in the final seniority of Selection Grade Officers of Goa Civil Service circulated vide Memorandum dated 01-11-2011, read above, shall be corrected to read as "31-12-2020" instead of "31-10-2020".

By order and in the name of the Governor of Goa.

Umeshchandra L. Joshi, Under Secretary (Personnel-I).

Porvorim, 5th March, 2012.

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Department of Revenue

Office of the Director of Mopa Airport

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Notification

No. SAP/1/98-VOL.VI/MOPA

In supersession of Notification No. SAP/1/98--VOL.VI/MOPA dated 30-10-2009, published in Official Gazette, Series II No. 32 dated 05-11-2009, Government is pleased to reconstitute the Steering Committee for the new International Airport at Mopa as follows:

1. Shri Manohar Parrikar, Hon'ble Chief Minister — Chairman.
2. Shri Rajendra Arlekar, Hon'ble Speaker and Hon'ble MLA (Pernem) — Vice Chairman.
3. Shri Laxmikant Parsekar, Hon'ble Minister for Health and Hon'ble MLA (Mandrem) — Member.
4. Chief Secretary, Government of Goa — Member.
5. Joint Secretary (Airport), Ministry of Civil Aviation, Government of India or authorized representative — Member.
6. Secretary (Finance), Government of Goa — Member.
7. Secretary (Revenue), Government of Goa — Member.
8. Member (Planning), Airport Authority of India or his authorized representative — Member.
9. Director (PPP Cell), Government of Goa — Member.
10. Chief Town Planner, Government of Goa — Member.
11. President, Confederation of Industries of India, Goa — Member.
12. President, Goa Chamber of Commerce and Industries — Member.
13. Director of Mopa Airport, Government of Goa — Member Secretary.

Special Invitee: Commodore, Goa Naval Area.

By order and in the name of the Governor of Goa.

R. Mihir Vardhan, Director of Mopa Airport.

Panaji, 27th March, 2012.

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Department of Printing & Stationery

Government Printing Press

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